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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 388

LOUISE A. CHISHOLM, Individually and as Administratrix of the Estate of Susie A. Hightower, WESLEY G. ANDERSON, and MARIE ANDERSON,

Petitioners,

vs.

DR. R. A. BILLINGS, Co-executor and Trustee under the Will of Dr. George L. Hightower, MISS MOLLIE MYRICK, Individually and as Co-executrix under the Will of Dr. George L. Hightower, REV. A. A. HIGHTOWER, Individually and as Trustee under the Will of Dr. George L. Hightower, MORRIS BROWN COLLEGE, a Georgia Corporation, THE HOWARD UNIVERSITY, a District of Columbia Corporation, COSMOPOLITAN A.M.E. CHURCH, an Unincorporated Association, PHI BETA SIGMA FRATERNITY, INC., a New York Corporation, ZETA CHAPTER OF PHI BETA SIGMA FRATERNITY, an Unincorporated Association, CHI CHAPTER OF PHI BETA SIGMA FRATERNITY, an Unincorporated Association, PSI CHAPTER OF PHI BETA SIGMA FRATERNITY, an Unincorporated Association, and LAMBDA SIGMA CHAPTER OF PHI BETA SIGMA FRATERNITY, an Unincorporated Association,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

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LOUISE A. CHISHOLM, Individually and as Administratrix of the Estate of Susie A. Hightower, WESLEY G. ANDERSON, and MARIE ANDERSON,
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vs.

DR. R. A. BILLINGS, Co-executor and Trustee under the Will of Dr. George L. Hightower, MISS MOLLIE MYRICK, Individually and as Co-executrix under the Will of Dr. George L. Hightower, REV. A. A. HIGHTOWER, Individually and as Trustee under the Will of Dr. George L. Hightower, MORRIS BROWN COLLEGE, a Georgia Corporation, THE HOWARD UNIVERSITY, a District of Columbia Corporation, COSMOPOLITAN A.M.E. CHURCH, an Unincorporated Association, PHI BETA SIGMA FRATERNITY, INC., a New York Corporation, ZETA CHAPTER OF PHI BETA SIGMA FRATERNITY, an Unincorporated Association, CHI CHAPTER OF PHI BETA SIGMA FRATERNITY, an Unincorporated Association, PSI CHAPTER OF PHI BETA SIGMA FRATERNITY, an Unincorporated Association, and LAMBDA SIGMA CHAPTER OF PHI BETA SIGMA FRATERNITY, an Unincorporated Association,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

The opinion of the Supreme Court of Georgia in *Chisholm, Administratrix, et al.* v. *Billings, Executor, et al.*,

case No. 22859 in the Supreme Court of Georgia, has not yet been reported. Said opinion is set out in Appendix C. The decision of the Supreme Court of Georgia was rendered on April 12, 1965 and the Petitioners' Motion for Rehearing was denied on May 6, 1965.

This Court has jurisdiction to review the present case by Writ of Certiorari as provided in 28 U.S.C. §1257. The question presented for review is whether the erroneous denial and limitation of discovery by the trial court in its order of June 16, 1964 and the subsequent erroneous refusal of the Supreme Court of Georgia to review and pass on the assignment of error relating to the denial and limitation of discovery deprived the Petitioners of their right of appeal under the Constitution and statutes of the State of Georgia in violation of the equal protection clause and due process clause of the Fourteenth Amendment of the Constitution of the United States. The Petitioners submit that the refusal of the Supreme Court of Georgia to review and rule on the assignment of error relating to discovery deprived them of their right of equal protection as to the right of appeal and deprived them of their property without due process in violation of the Fourteenth Amendment. *Dowd* v. *United States ex rel: Cook*, 340 U.S. 206, 71 S.Ct. 262, 95 L.Ed. 215 (1951); *Chessman* v. *Teets*, 354 U.S. 156, 77 S.Ct. 1127, 1 L.Ed.2d 1253 (1957); *Griffin* v. *People of the State of Illinois*, 351 U.S. 12, 18, 100 L.Ed. 907, 76 S.Ct. 598.

In Paragraph IV, Article VI, of the *Constitution of Georgia of 1945* (*Georgia Code* §2-3704) the Supreme Court of Georgia is designated as a Court "... for the trial and correction of errors of law from the superior courts ... in all equity cases; in all cases which involve the validity of or the construction of wills..." An appeal by bill of exceptions is provided by *Georgia Code* §§6-901 and 6-801. The duty of the Supreme Court to rule on the assignments of error in

the bill of exceptions is set out in *Georgia Code* §§6-701 and 6-1607. In *Georgia Code* §6-1607 it is expressly provided that the appellate court shall decide any question made by assignment of error.

By refusing to rule upon the assignment of error as to the denial of discovery, the Supreme Court of Georgia deprived the Petitioners of their right to appeal as afforded by the above-cited constitutional and statutory provisions. The erroneous ruling of the trial court denying and limiting discovery on June 16, 1964 affected the final result of the case in that it proximately caused the sustaining of a general demurrer by the trial court and an affirmance by the appellate court on the ground that the amount of the assets in the estate of Dr. George L. Hightower were not alleged. The orders of the trial court of June 16, 1964 and November 3, 1964 are set out as Appendices A and B and the opinion and judgment of the Supreme Court of Georgia is set out as Appendix C.

The present case arises out of a will containing devises to educational, religious and charitable institutions that are void under *Georgia Code* §113-107. The will is that of Dr. George L. Hightower, who died on March 8, 1963, leaving a will dated December 19, 1962 and a codicil dated January 11, 1963. The will left more than one-third of Dr. Hightower's estate to educational, religious and charitable institutions and the will and codicil had been executed less than ninety days before his death. Dr. Hightower's wife, Mrs. Susie A. Hightower, survived him, and therefore the devises to the educational, religious and charitable institutions were void under *Georgia Code* §113-107.

Thirty-nine days after her husband's death, Mrs. Susie A. Hightower died intestate, leaving Petitioners Louise

A. Chisholm, Wesley Anderson, and Marie Anderson (her brother and sisters) as her sole heirs-at-law. Mrs. Louise A. Chisholm was appointed as the Administratrix of the estate of Susie A. Hightower. The Petitioners brought an action in equity seeking construction of the provisions of Dr. Hightower's will, an accounting and temporary and permanent injunctions. The petition in equity attacked the devises to the educational, religious and charitable institutions as being in violation of *Georgia Code* §113-107 and therefore void. *Kine* v. *Becker*, 82 Ga. 563, 9 S.E. 828 (1889); *Kelley* v. *Welborn*, 110 Ga. 540, 35 S.E. 636 (1900); *Trustees of the University of Georgia* v. *Denmark*, 141 Ga. 390, 81 S.E. 238 (1913); *Reynolds* v. *Bristow & Kent*, 37 Ga. 283 (1867); *Wesley Memorial Hospital* v. *Thompson*, 164 Ga. 466, 139 S.E. 15 (1927) and *Beynes* v. *Brooks*, 219 Ga. 140, 132 S.E.2d 42 (1963).

The Petitioners, as the Administratrix and sole heirs-at-law of Susie A. Hightower have a remainder interest in the assets passing under Items III, V, VI, IX, XI, XII, XIII, and XV of Dr. Hightower's will and codicil and upon the termination of the life interest of Rev. A. A. Hightower, the Petitioners will have a fee simple interest in said assets.

The Petitioners served the defendants with a notice to take depositions and a subpoena duces tecum. (R. 35-36, 41-43) The defendants filed a Motion to Stay Examination on Oral Deposition or in the Alternative to Limit the Scope of Examination. (R. 37-44) The Court entered an order dated July 16, 1964, denying and limiting discovery. (R. 45-47) (Appendix A) It is this order and the refusal of the Supreme Court of Georgia to pass on the assignment of error on this order, that gives rise to the present Petition for Writ of Certiorari.

Since the erroneous ruling of the trial court denying and limiting discovery affected the final result of the case, the Supreme Court of Georgia erred in refusing to review the assignment of error relating to denial of discovery. The fact that such denial of discovery might affect the final result of the case was pointed out to the trial court by counsel for the Petitioners. In this connection, see the Court's order of June 16, 1964 at page 45 of the Record:

> *"Counsel for the plaintiff expressed a fear that the allegations as contained in Paragraphs 19, 20, 21, 24, 26, 29, and 31 [the paragraphs dealing with the amount of assets involved] might not be sufficient allegations of fact to withstand an attack by general demurrer.* Counsel for the Defendants calls the court's attention to the fact that the allegations contained in Paragraphs 19 and 24 of the petition are admitted and that there are no special demurrers *and that his general demurrers are not designed to question the sufficiency of those particular allegations as such."* (Emphasis added)

At page 46 of the record the trial court went on to limit discovery as follows:

> "Counsel for the plaintiff shall then be allowed to immediately proceed to take a deposition as to the questions raised by Ground 2(b) of the defendants' demurrer, *but is limited as to all other matters of inquiry until the general demurrers have been passed upon."* (Emphasis added)

The denial and limitation of discovery had a direct and harmful effect on the Petitioners' ability to plead the amount of assets in the estate of Dr. Hightower and therefore the Supreme Court of Georgia should have reversed the trial court's rulings on both the order of July 16, 1964

and the order of November 3, 1964. Discovery of the amount of assets involved was essential to proper pleading by the Petitioners and the trial court erred in denying discovery and the Supreme Court of Georgia erred in refusing to review the assignment of error relating to the order denying and limiting discovery. This refusal to review and pass on the assignment of error constitutes a violation of the equal protection clause and due process clause of the Fourteenth Amendment of the Constitution of the United States.

In its opinion the Supreme Court of Georgia held that the Petitioners did not state a cause of action because the amount of the assets involved was not pleaded. At the same time the same Court held that it need not rule on the trial court's refusal to allow discovery of the amount of assets by deposition and subpoena duces tecum. These two holdings are incongruous and put the petitioners in the predicament of being forced to plead facts as to assets at the same time the Petitioners are prevented by court order from discovery of these same facts. Petitioners submit that such a holding is manifestly unfair to them and violates the due process and equal protection clauses of the Fourteenth Amendment.

The Federal question in this case did not appear until the Supreme Court of Georgia arbitrarily and surprisingly refused to consider the assignment of error relating to the denial of discovery. Therefore, it is appropriate for this Court to pass on the question of whether the refusal of the Supreme Court of Georgia to rule on the assignment of error deprived the Petitioners of their rights under the equal protection and due process clauses of the Fourteenth Amendment.

WHEREFORE, the Petitioners pray that a Writ of Certiorari issue to the Supreme Court of Georgia, so that the errors complained of may be considered and corrected.

Respectfully submitted,

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APPENDIX

APPENDIX A

Trial Court's Order of June 16, 1964

LOUISE A. CHISHOLM, ADMINISTRATRIX, Estate of Susie A. Hightower, deceased, et al. vs. DR. R. A. BILLINGS and REV. A. A. HIGHTOWER, Trustees under the Will of Dr. George L. Hightower, deceased, et al.	Case Number B-4034 Fulton Superior Court

ORDER

The above matter coming on to be heard before the Court on the Defendant's motion to stay examination on oral deposition or in the alternative to limit the scope of the examination, and after hearing argument of counsel and studying the pleadings, the Court enters the following order.

Counsel for the Plaintiffs expressed a fear that the allegations as contained in Paragraphs 19, 20, 21, 24, 26, 29 and 31 might not be sufficient allegations of fact to withstand an attack by general demurrer. Counsel for the Defendants calls the court's attention to the fact that the allegations contained in paragraphs 19 and 24 of the petition are admitted and that there are no special demurrers and that his general demurrers are not designed to question the sufficiency of those particular allegations as such. The Court does not feel that Counsel for the Plaintiffs is entitled to a full and complete deposition and a full and

complete examination of the records of the Defendants prior to the time that the court passes on the general demurrers; however, counsel for the defendants have stated at this time although the defendants deny the allegations as to the transfer of assets, that the defendants do not intend to ask for a hearing on the question of temporary injunction and are willing to allow the temporary restraining order to remain in force until a ruling on the demurrers in question. Equity does not require a party to do that which he is willing voluntarily to do and in view of the statement of counsel in open court in connection with the temporary injunction, the motion to limit the scope of examination on oral deposition is granted, subject to this exception. Ground 2(b) of the defendants' demurrer is based upon the contention that said petition fails to allege any facts to show that Susie A. Hightower, deceased, surviving wife and sole heir of Dr. George L. Hightower, deceased, during her lifetime elected or pursued any legal procedures to claim or assert her rights under said provisions of the law aforesaid, that would as a matter of law survive to be claimed and asserted on behalf of her estate by her personal representative or her heirs at law.

Counsel for the plaintiff shall then be allowed to immediately proceed to take a deposition as to the questions raised by Ground 2(b) of the defendants' demurrer, but is limited as to all other matters of inquiry until the general demurrers have been passed upon. This limitation of scope, however, is contingent upon the defendants' complying with the subpoena duces tecum to this extent. They may either deposit with the Clerk of the Court the documents requested in the subpoena duces tecum or, in the alternative, furnish counsel for the plaintiff with a detailed list of what records, books, papers and memoranda that are in their possession, and preserving said records.

books, papers and related memoranda or other documents pending the disposition of the general demurrers.

This order shall not be construed as requiring the defendants to disclose the contents of said documents, records, books, papers and memoranda as long as they are described in such manner as to readily identify same. This order is to be effective only until a ruling has been had on the general demurrers to the petition and shall be of no force and effect after the Court has entered a ruling on said demurrers. Consequently the parties are thereafter free to pursue their remedies under the law of discovery of this State, which laws are by the directive of the appellate courts of this State to be liberally construed.

This 16 day of June, 1964.

s/ Sam Phillips McKenzie
Judge, Superior Court, Atlanta
Judicial Circuit.

APPENDIX B

Trial Court's Order of November 3, 1964

LOUISE A. CHISHOLM, ADMINISTRATRIX, ESTATE OF SUSIE A. HIGHTOWER, DECEASED, ET AL. vs. DR. R. A. BILLINGS and MISS MOLLIE MYRICK, CO-EXECUTOR and CO-EXECUTRIX UNDER THE WILL OF DR. GEORGE L. HIGHTOWER, DECEASED, ET AL.	Case No. B-4034 Fulton Superior Court

ORDER

The renewed motion to dismiss of defendant Howard University, the renewed demurrers of defendants R. A. Billings and A. A. Hightower, as Trustees under the Will of Dr. George L. Hightower, deceased, and the renewed demurrers of defendants R. A. Billings and Mollie Myrick, Co-Executor and Co-Executrix under the Will of Dr. George L. Hightower, all of said pleadings being filed on September 15, 1964 to the plaintiff's petition as previously amended, and all of said pleadings having come on before this Court for a hearing, and argument of counsel for all parties having been heard thereon and considered, it is hereby ORDERED AND ADJUDGED that the said motion to dismiss as renewed, and the said general demurrers be and the same are hereby sustained, and the plaintiff's petition is dismissed.

The plaintiff's case having been dismissed, the Court makes no ruling on the special demurrers therein.

This November 3, 1964.

s/ Jeptha C. Tanksley
Judge, Superior Court,
Atlanta Judicial Circuit.

APPENDIX C

Opinion of Supreme Court of Georgia
dated April 12, 1965

CHISHOLM, ADMINISTRATRIX, et al. v. BILLINGS, EXECUTOR, et al., Case No. 22859 in the Supreme Court of Georgia (decided April 12, 1965):

> "Because petitioners do not allege sufficient facts to show that the proviso of Ga. Code Ann. 113-107 is not applicable, their petition failed to set forth a cause of action and was properly dismissed.

ALMAND, Justice: Louise A. Chisholm, as administratrix of the estate of Susie A. Hightower and as her sister and heir at law, together with a brother and sister of Susie A. Hightower, brought a petition against the executors of the estate of Dr. George L. Hightower, certain named trustees under the will of Dr. Hightower and several named parties who were the beneficiaries of the trust fund set up in the will. It was alleged: that the testator died on March 8, 1963, leaving his wife Susie A. Hightower and no children or descendants of children; that he left a will, which has been probated, executed on December 19, 1962, in which he left more than one third of his estate to charitable uses to the exclusion of his wife; that having died less than 90 days after the execution of the will, the bequests to charity were void under the provisions of Ga. Code Ann. 113-107. It was alleged that his widow was dissatisfied with the bequests to the several charitable organizations and had prepared to consult an attorney, but was prevented from doing so by her sudden death on April 16, 1963. As to the value of the estate it was alleged: 'Upon the probate of the will of Dr. George L. Hightower the defendants, Dr. R. A. Billings and Miss Molly Myrick, co-executor and co-executrix, took into their possession all of the assets of the estate of Dr. George L. Hightower. The

exact nature of these assets are well known to the defendants, but unknown to the petitioners, whose demand for an accounting has been refused by said defendants, however, it is known that said assets exceeded the debts of the estate by a substantial amount.' 'Upon information and belief the petitioners aver that the defendant co-executor and co-executrix have distributed a portion of the assets of said estate to the defendants Rev. A. A. Hightower and Dr. R. A. Billings, trustees under the will of Dr. George L. Hightower. The exact amount of said assets distributed is well known to the defendants, but unknown to the petitioners, whose demand for an accounting has been refused.' 'Upon information and belief the petitioners aver that the defendant co-executor and co-executrix have distributed a portion of the assets of said estate to Morris Brown College of Atlanta, Georgia. The exact amount of said assets distributed is well known to the defendants, but unknown to the petitioners, whose demand for an accounting has been refused.' 'Petitioners aver that the will of Dr. George L. Hightower left more than one-third of his estate to charitable, religious and educational institutions. The exact value of that portion left to charitable, religious and educational institutions is well known to the defendants, but unknown to the petitioners, whose demand for an accounting has been refused by the defendants, Dr. R. A. Billings and Miss Mollie Myrick.' The petition sought a construction of the will of the testator and a decree declaring the bequests to the several charitable organizations to be void, an accounting by the executors, and injunctive relief.

The executors and trustees named in the testator's will demurred generally to the petition on the grounds that (a) that petition fails to allege a cause of action for any of the relief prayed for and (b) that none of the petitioners

had legal standing or any legal interest or right to seek a construction of the will for the purpose of having the bequests to charitable uses declared as null and void.

In 1937 the legislature amended Ga. Code 113-107, which then provided: 'No person leaving a wife or child, or descendants of child, shall, by will, devise more than one third of his estate to any charitable, religious, educational, or civil institution, to the exclusion of such wife or child; and in all cases the will containing such devise shall be executed at least ninety days before the death of the testator, or such devise shall be void.' by adding the following: 'Provided, however, that when the estate shall exceed two hundred thousand dollars in value, the restrictions of this section shall not apply to such excess, and in estimating values of devises that of a life-estate under the annuity tables shall be included.' Ga. Laws 1937, p. 430. It is evident from the caption of this Act and the re-enactment of Ga. Code 113-107 as amended that the proviso was made a part of the enacting clause. This statute restricting or limiting the testamentary power of the testator, being in derogation of the common law, is to be strictly construed. Monahan v. O'Byrne, 147 Ga. 633 (95 S.E. 210); 15 Am. Jur. 2d, Charities, §23 & §24. The proviso of the statute should be considered in connection with the entire act of which it is a part. Board of Education & Orphanage for Bibb County v. State Board of Education, 186 Ga. 200 (7) (197 SE 261). Where an exception or proviso forms a necessary part of the statute in the enacting clause, the party relying upon the statute must allege facts showing that the case under consideration does not fall within the exception or proviso. See cases cited in 41 Am. Jur. §94, p. 355 and the annotation in 130 ALR 441. 'Where a party relies for recovery on a statute, particularly one creating a liability where none existed before, he must state facts

showing his right to recover under that statute, and bring himself clearly, fairly, or substantially within its terms or provisions; and it is necessary that such statement shall include every fact which is essential to the existence of a cause of action under the statute, and show that plaintiff, or the person on whose behalf he sues, is entitled to the benefit and protection of the statute and that defendant is liable thereunder.' 71 CJS §86, p. 201-203. See also Crowley v. Hughes, 74 Ga. App. 531 (40 SE 2d 570).

The petitioners do not allege the amount or value of the estate. Under Ga. Code Ann. 113-107, if the value of the estate exceeded $200,000.00 the restrictions of the section would not apply to the excess. The general allegation that the bequests to charitable organizations were more than one third of the testator's estate is contradicted by other allegations that petitioners do not know the amounts or values of the charitable bequests. Allegations in a petition which are ambiguous, inconsistent or contradictory will be construed most strongly against the pleader. Owen v. Richards Paper Co., 188 Ga. 258(1) (3 SE2d 600); Butler v. City of Dublin, 191 Ga. 551 (13 SE2d 362); Hoffman v. Chester, 204 Ga. 296 (49 SE2d 760). At the most, all that petitioners allege is that they do not know the amount or value of the testator's estate. The petitioners do not allege sufficient facts to show that the proviso of Ga. Code Ann. 113-107 is not applicable. Assuming, but not holding, that the petitioners are such parties that are permitted under Ga. Code Ann. 113-107 to question the validity of the charitable bequest (Beynes v. Brooks, 219 Ga. 140, 143, 132 SE2d 42, 44), we hold that their petition failed to set forth a cause of action and was properly dismissed.

When, as here, a petition fails to state a cause of action for any of the relief sought, and is, for that reason,

dismissed on general demurrer, it is unnecessary for this court to deal with another assignment of error complaining of an antecedent ruling which the trial judge had made in the case respecting practice and procedure. Phillips v. Phillips, 211 Ga. 305(3) (85 SE2d 427). Therefore we do not rule on the assignment of error complaining of the court's order limiting the scope of examination on the depositions which the plaintiffs sought to take under the provisions of Ga. Code Ann. 38-2101 (Ga. Laws 1959, pp. 426-29).

Judgment affirmed. All the Justices concur.

APPENDIX D

Constitutional Provisions and Statutes

Fourteenth Amendment, Constitution of the United States: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article VI, Paragraph IV, *Constitution of the State of Georgia of 1945* (*Georgia Code* §2-3704): "*Jurisdiction of Supreme Court*—The Supreme Court shall have no original jurisdiction but shall be a court alone for the trial and correction of errors of law from the superior courts and the city courts of Atlanta and Savannah, as existed on August 16, 1916, and such other like courts as have been or may hereafter be established in other cities, in all cases

that involve the construction of the Constitution of the State of Georgia or of the United States, or of treaties between the United States and foreign governments; in all cases in which the constitutionality of any law of the State of Georgia or of the United States is drawn in question; and, until otherwise provided by law, in all cases respecting title to land; in all equity cases; in all cases which involve the validity of, or the construction of wills; in all cases of conviction of a capital felony; in all habeas corpus cases; in all cases involving extraordinary remedies; in all divorce and alimony cases, and in all cases certified to it by the Court of Appeals for its determination. It shall also be competent for the Supreme Court to require by certiorari or otherwise any case to be certified to the Supreme Court from the Court of Appeals for review and determination with the same power and authority as if the case had been carried by writ of error to the Supreme Court. Any case carried to the Supreme Court or to the Court of Appeals, which belongs to the class of which the other court has jurisdiction, shall, until otherwise provided by law, be transferred to the other court under such rules as the Supreme Court may prescribe, and the cases so transferred shall be heard and determined by the court which has jurisdiction thereof. The General Assembly may provide for carrying cases or certain classes of cases to the Supreme Court and the Court of Appeals from the trial courts otherwise than by writ of error, and may prescribe conditions as to the right of a party litigant to have his case reviewed by the Supreme Court or Court of Appeals. The Supreme Court shall also have jurisdiction of and shall decide cases transferred to it by the Court of Appeals because of an equal division between the Judges of that Court when sitting as a body for the determination of cases."

Georgia Code §6-701: "Causes pending in lower court; finality of judgments; mandamus and quo warranto cases—

No cause shall be carried to the Supreme Court or Court of Appeals upon any bill of exceptions while the same is pending in the court below, unless the decision or judgment complained of, if it had been rendered as claimed by the plaintiff in error, would have been a final disposition of the cause or final as to some material party thereto, or unless the judgment is one sustaining, overruling, or dismissing a plea to the jurisdiction, or a plea of res judicata, or one sustaining or overruling a general demurrer to a caveat to the probate of a will, which would necessarily be controlling as to the final disposition of the cause, and should the case at its final determination be carried by writ of error to the Supreme Court or Court of Appeals by either party, error may be assigned upon any antecedent ruling and a reversal and a new trial may be allowed thereon, when it shall be manifest that such erroneous decision of the court has or may have affected the final result of the case, irrespective of the time elapsing between the date of such antecedent ruling and the presentation of the final bill of exceptions. Where a bill of exceptions is permissible, all judgments, rulings, or orders rendered in the case which are assigned as error, and which may affect the proceedings below, shall be reviewed and determined by the appellate court, without regard to the appealability of such judgment, ruling or order standing alone, and without regard to whether the judgment, ruling or order excepted to was final, or was subject to review by some other express provision of law contained in this section, or elsewhere. For purposes of review by the appellate court, one or more judgments, rulings or orders by the trial court held to be erroneous on appeal shall not be deemed to have rendered all subsequent proceedings nugatory, but the appellate court shall in all cases review all judgments, rulings, or orders excepted to which may affect the proceedings below, and which were rendered subsequent to the first judgment, ruling or order held

erroneous. Nothing in this paragraph shall require the appellate court to pass upon questions which are rendered moot. No bill of exceptions as to any ruling or decision in a mandamus or quo warranto proceeding or in a case involving a writ of prohibition may be taken to the Supreme Court by a bill of exceptions and writ of error until there has been a final judgment in the trial court. The overruling of a general demurrer in any of these cases shall not be deemed a final judgment subject to review; but the grant of a new trial shall be treated as a final judgment in these cases and subject to review as in other cases. (Act 1890-1, p. 82; 1946, pp. 726, 730; 1953, Nov. Sess., pp. 440, 455, 1957, pp. 224, 230)."

Georgia Code §6-801: "Mode of taking cases to Supreme Court or Court of Appeals by bill of exceptions—Cases shall be taken to the Supreme Court or the Court of Appeals by bill of exceptions only in the following manner:

1. If the case is not one in which a judgment on a motion for new trial is to be reviewed, the plaintiff in error shall plainly and specifically set forth the errors alleged to have been committed, and shall incorporate in the bill of exceptions a brief of such of the written and oral evidence as is material to a clear understanding of the errors complained of, or a stenographic report of the trial of the case, with immaterial questions and answers and parts thereof stricken, and copies of a summary of documentary evidence introduced at the trial, and shall specify therein such portions of the record as are material to such understanding.

2. If none of the evidence is material to elucidate the errors complained of, this fact shall be stated and the evidence omitted.

3. The judge to whom such bill of exceptions is tendered shall, if needful, change the same so as to conform to the trust and make it contain all the evidence, and refer to all of the record, necessary to a clear understanding of the errors complained of.

4. The judge shall require the clerk to send up only so much of the record as he may certify is material, except as hereinafter provided. (Act. 1889, p. 114; 1953, Nov. Sess., pp. 440, 447)"

Georgia Code §6-901: "Right to take exceptions; contents of bills of exceptions; cross-bills.—Either party in any civil cause, and the defendant in any criminal proceeding, in the superior or city courts, may except to any sentence, judgment, or decision, or decree of such court, or of the judge thereof in any matter heard at chambers. Such bill of exceptions shall specify plainly the decision complained of and the alleged error, and shall be signed by the party or his attorney. When the successful party to any cause tried in any of the superior or city courts, which is carried to the Supreme Court or the Court of Appeals, shall file a cross-bill of exceptions complaining of errors in rulings made upon the trial adverse to him, it shall be the duty of the appellate court to hear argument upon such cross-bill of exceptions, and to decide the questions therein made, if a reversal of the judgment of the court below shall be ordered, or if the effect of the affirmance shall be to leave the case to be again tried in the court below. Motions for new trial and for judgment notwithstanding the verdict, and assignments of error in the bill of exceptions need not set out therein portions of record of transcript of evidence, nor shall it be necessary that the grounds thereof be complete in themselves, but shall point out such parts of the record or brief of the evidence by page number as are necessary to an understanding of the error

complained of. Where, in preparing the record for transmission to the appellate court, the paging of the record is changed as required by section 6-1001, parties in their briefs shall point out the page numbers of the record where pages of the brief of evidence or other portions of the record pointed out in the assignment of error may be found. (Acts 1880-1, p. 123, 1887, p. 41; 1957, pp. 224, 232.)"

Georgia Code §6-1607: "What appellate court shall decide.—The Supreme Court or the Court of Appeals shall not decide any question unless it is made by a specific assignment of error in the bill of exceptions, and shall decide any question made by such assignment. (Acts 1882-3, p. 107; 1889, p. 114; 1892, p. 113)"

Georgia Code §113-107: "Charitable devises.—No person leaving a wife or child, or descendants of child, shall, by will, devise more than one-third of his estate to any charitable, religious, educational, or civil institution, to the exclusion of such wife or child; and in all cases the will containing such devise shall be executed at least 90 days before the death of the testator, or such devise shall be void: Provided, however, that when the estate shall exceed $200,000 in value, the restrictions of this section shall not apply to such excess, and in estimating values that of a life estate under the annuity tables shall be included. (Acts 1937, p. 430.)"

CERTIFICATE OF SERVICE

I, HAMILTON DOUGLAS, attorney for Petitioners for the Writ of Certiorari, do hereby certify that I have this day served counsel for the Respondents and each of the Respondents, with the required number of copies of this Petition for Certiorari by depositing the same in the United States Mail in a properly addressed envelope with sufficient postage attached to carry the same to their destination.

This ..... day of July, 1965.

HAMILTON DOUGLAS

SUPREME COURT, U. S.
FILED
JUL 23 1965
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 388

LOUISE A. CHISHOLM, Individually and as Administratrix of the Estate of Susie A. Hightower, WESLEY G. ANDERSON, and MARIE ANDERSON,
Petitioners,

vs.

DR. R. A. BILLINGS, Co-executor and Trustee under the Will of Dr. George L. Hightower, MISS MOLLIE MYRICK, Individually and as Co-executrix under the Will of Dr. George L. Hightower, REV. A. A. HIGHTOWER, Individually and as Trustee under the Will of Dr. George L. Hightower, MORRIS BROWN COLLEGE, a Georgia Corporation, THE HOWARD UNIVERSITY, a District of Columbia Corporation, COSMOPOLITAN A.M.E. CHURCH, an Unincorporated Association, PHI BETA SIGMA FRATERNITY, INC., a New York Corporation, ZETA CHAPTER OF PHI BETA SIGMA FRATERNITY, an Unincorporated Association, CHI CHAPTER OF PHI BETA SIGMA FRATERNITY, an Unincorporated Association, PSI CHAPTER OF PHI BETA SIGMA FRATERNITY, an Unincorporated Association, and LAMBDA SIGMA CHAPTER OF PHI BETA SIGMA FRATERNITY, an Unincorporated Association,
Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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IN THE

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OCTOBER TERM, 1965

No. .....

LOUISE A. CHISHOLM, Individually and as Administratrix of the Estate of Susie A. Hightower, *et al.*,

Petitioners,

vs.

DR. R. A. BILLINGS, Co-executor and Trustee under the Will of Dr. George L. Hightower, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

BRIEF FOR RESPONDENTS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The opinion and judgment of the Supreme Court of Georgia in Chisholm, Administratrix, *et al.* v. Billings Executor, *et al.* has not yet been reported, but is appended hereto.

JURISDICTION

The judgment of the Supreme Court of Georgia was dated and entered on April 12, 1965 and the Petitioners' Motion for Rehearing was denied on May 6, 1965.

This Court does not have jurisdiction to review the present cause by a Writ of Certiorari pursuant to 28 U. S. C. Section 1257. It clearly appears from the record in this case that Petitioners have not at any stage of the proceeding in the said case asserted in the trial court or in the Supreme Court of Georgia any claim of a denial or violation and infringement of privileges and immunities or rights under the equal protection clause of the due process clause of the Fourteenth Amendment to the Constitution of the United States, nor does it appear from the record of said case that the Supreme Court of Georgia in its opinion and judgment passed upon or decided any federal question under the Federal Constitution. It is therefore in this Court by petition for a Writ of Certiorari that Petitioners assert, for the first time in said cause, a claim of denial of privileges and immunities under the Federal Constitution.

It is settled doctrine that a claim of denial or violation of privileges and immunities or rights under the Federal Constitution not asserted in the state courts, nor passed upon and decided in the state court will not be considered on a Writ of Certiorari. *Bothwell v. Buckbee-Mears Co.*, 275 U.S. 274, 48 S.Ct. 124; *Cleveland and etc., R. Co. v. Cleveland, Ohio*, 235 U.S. 50, 35 S.Ct. 21; *Mutual Life Ins. Co. v. McGrew*, 188 U.S. 291, 23 S.Ct. 375; *Edelman v. People of State of Calif.*, 344 U.S. 357, 73 S.Ct. 293; and *Quicksall v. People of State of Mich.*, 339 U.S. 600, 70 S.Ct. 910.

In the Court of first instance, upon the limiting of the taking of depositions by the trial court, no federal or constitutional question was raised by the Petition-

ers. It is also clear that Petitioners had the opportunity to raise and present the Federal question of challenging the ruling and judgment of the trial court in limiting the scope of the taking of depositions on appeal to the Supreme Court of Georgia, and also the opportunity of raising the Federal question upon the ruling and judgment of the Supreme Court of Georgia in refusing to review on appeal the ruling of the trial court on limiting the taking of depositions in the motion for rehearing filed by them, as Petitioners now assert in their Petition for a Writ of Certiorari. This Petitioners did not do. Though they did file a Motion for Rehearing in the Supreme Court of Georgia, they confined themselves to assignments of alleged various errors on the judgment of the Supreme Court under the local law. (See *Saunders v. Shaw*, 244 U.S. 317, 37 S.Ct. 638, and *Great Northern Ry. Co. v. Sunburst Oil and Refining Co.*, 287 U.S. 358, 53 S.Ct. 145, where this Court said:

> "The settled doctrine is that when a Constitutional privilege or immunity has been denied for the first time by a ruling made upon appeal, a litigant thus surprised may challenge the unexpected ruling by a Motion for Rehearing."

This Court, not having jurisdiction to review this case upon the Writ of Certiorari, may not proceed to a consideration of the merits of the Petitioners' petition for a Writ of Certiorari.

CONCLUSION

WHEREFORE, for the reasons hereinabove stated, it is submitted that this Petition for Writ of Certiorari should not be granted.

Respectfully submitted,

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and

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Attorneys for Respondents,
Dr. R. A. Billings, Co-executor and Trustee under the Will of Dr. George L. Hightower, Miss Mollie Myrick, individually and as Co-executrix under the Will of Dr. George L. Hightower, Rev. A. A. Hightower, Individually and as Trustee under the Will of Dr. George L. Hightower, Morris Brown College, a Georgia Corporation, The Howard University, a District of Columbia Corporation.

APPENDIX

Opinion of Supreme Court of Georgia dated April 12, 1965

CHISHOLM, ADMINISTRATRIX, et al. v. BILLINGS, EXECUTOR, et al., Case No. 22859 in the Supreme Court of Georgia (decided April 12, 1965):

> "Because petitioners do not allege sufficient facts to show that the proviso of Ga. Code Ann. 113-107 is not applicable, their petition failed to set forth a cause of action and was properly dismissed.

ALMAND, Justice: Louise A. Chisholm, as administratrix of the estate of Susie A. Hightower and as her sister and heir at law, together with a brother and sister of Susie A. Hightower, brought a petition against the executors of the estate of Dr. George L. Hightower, certain named trustees under the will of Dr. Hightower and several named parties who were the beneficiaries of the trust fund set up in the will. It was alleged: that the testator died on March 8, 1963, leaving his wife Susie A. Hightower and no children or descendants of children; that he left a will, which has been probated, executed on December 19, 1962, in which he left more than one third of his estate to charitable uses to the exclusion of his wife; that having died less than 90 days after the execution of the will, the bequests to charity were void under the provisions of Ga. Code Ann. 113-107. It was alleged that his widow was dissatisfied with the bequests to the several charitable organizations and had prepared to consult an attorney, but was prevented from doing so by her sudden death on April 16, 1963. As to the value of the estate it was alleged: 'Upon the probate of the will of Dr. George L. Hightower the defendants, Dr. R. A. Billings and Miss Molly Myrick, co-executor and co-executrix, took into their possession all of the assets of the estate of Dr. George L. Hightower. The

exact nature of these assets are well known to the defendants, but unknown to the petitioners, whose demand for an accounting has been refused by said defendants, however, it is known that said assets exceeded the debts of the estate by a substantial amount.' 'Upon information and belief the petitioners aver that the defendant co-executor and co-executrix have distributed a portion of the assets of said estate to the defendants Rev. A. A. Hightower and Dr. R. A. Billings, trustees under the will of Dr. George L. Hightower. The exact amount of said assets distributed is well known to the defendants, but unknown to the petitioners, whose demand for an accounting has been refused.' 'Upon information and belief the petitioners aver that the defendant co-executor and co-executrix have distributed a portion of the assets of said estate to Morris Brown College of Atlanta, Georgia. The exact amount of said assets distributed is well known to the defendants, but unknown to the petitioners, whose demand for an accounting has been refused.' 'Petitioners aver that the will of Dr. George L. Hightower left more than one-third of his estate to charitable, religious and educational institutions. The exact value of that portion left to charitable, religious and educational institutions is well known to the defendants, but unknown to the petitioners, whose demand for an accounting has been refused by the defendants, Dr. R. A. Billings and Miss Mollie Myrick.' The petition sought a construction of the will of the testator and a decree declaring the bequests to the several charitable organizations to be void, an accounting by the executors, and injunctive relief.

The executors and trustees named in the testator's will demurred generally to the petition on the grounds that (a) that petition fails to allege a cause of action for any of the relief prayed for and (b) that none of the petitioners

had legal standing or any legal interest or right to seek a construction of the will for the purpose of having the bequests to charitable uses declared as null and void.

In 1937 the legislature amended Ga. Code 113-107, which then provided: 'No person leaving a wife or child, or descendants of child, shall, by will, devise more than one third of his estate to any charitable, religious, educational, or civil institution, to the exclusion of such wife or child; and in all cases the will containing such devise shall be executed at least ninety days before the death of the testator, or such devise shall be void.' by adding the following: 'Provided, however, that when the estate shall exceed two hundred thousand dollars in value, the restrictions of this section shall not apply to such excess, and in estimating values of devises that of a life-estate under the annuity tables shall be included.' Ga. Laws 1937, p. 430. It is evident from the caption of this Act and the re-enactment of Ga. Code 113-107 as amended that the proviso was made a part of the enacting clause. This statute restricting or limiting the testamentary power of the testator, being in derogation of the common law, is to be strictly construed. Monahan v. O'Byrne, 147 Ga. 633 (95 S.E. 210); 15 Am. Jur. 2d, Charities, §23 & §24. The proviso of the statute should be considered in connection with the entire act of which it is a part. Board of Education & Orphanage for Bibb County v. State Board of Education, 186 Ga. 200 (7) (197 SE 261). Where an exception or proviso forms a necessary part of the statute in the enacting clause, the party relying upon the statute must allege facts showing that the case under consideration does not fall within the exception or proviso. See cases cited in 41 Am. Jur. §94, p. 355 and the annotation in 130 ALR 441. 'Where a party relies for recovery on a statute, particularly one creating a liability where none existed before, he must state facts

showing his right to recover under that statute, and bring himself clearly, fairly, or substantially within its terms or provisions; and it is necessary that such statement shall include every fact which is essential to the existence of a cause of action under the statute, and show that plaintiff, or the person on whose behalf he sues, is entitled to the benefit and protection of the statute and that defendant is liable thereunder.' 71 CJS §86, p. 201-203. See also Crowley v. Hughes, 74 Ga. App. 531 (40 SE 2d 570).

The petitioners do not allege the amount or value of the estate. Under Ga. Code Ann. 113-107, if the value of the estate exceeded $200,000.00 the restrictions of the section would not apply to the excess. The general allegation that the bequests to charitable organizations were more than one third of the testator's estate is contradicted by other allegations that petitioners do not know the amounts or values of the charitable bequests. Allegations in a petition which are ambiguous, inconsistent or contradictory will be construed most strongly against the pleader. Owen v. Richards Paper Co., 188 Ga. 258(1) (3 SE2d 600); Butler v. City of Dublin, 191 Ga. 551 (13 SE2d 362); Hoffman v. Chester, 204 Ga. 296 (49 SE2d 760). At the most, all that petitioners allege is that they do not know the amount or value of the testator's estate. The petitioners do not allege sufficient facts to show that the proviso of Ga. Code Ann. 113-107 is not applicable. Assuming, but not holding, that the petitioners are such parties that are permitted under Ga. Code Ann. 113-107 to question the validity of the charitable bequest (Beynes v. Brooks, 219 Ga. 140, 143, 132 SE2d 42, 44), we hold that their petition failed to set forth a cause of action and was properly dismissed.

When, as here, a petition fails to state a cause of action for any of the relief sought, and is, for that reason,

dismissed on general demurrer, it is unnecessary for this court to deal with another assignment of error complaining of an antecedent ruling which the trial judge had made in the case respecting practice and procedure. Phillips v. Phillips, 211 Ga. 305(3) (85 SE2d 427). Therefore we do not rule on the assignment of error complaining of the court's order limiting the scope of examination on the depositions which the plaintiffs sought to take under the provisions of Ga. Code Ann. 38-2101 (Ga. Laws 1959, pp. 426-29).

Judgment affirmed. All the Justices concur.

CERTIFICATE OF SERVICE

I, GEORGE E. C. HAYES, attorney for Respondents, do hereby certify that I have this day served counsel for the Petitioners with the required number of copies of this Brief in Opposition to the Petition for Writ of Certiorari by depositing the same in the United States Mail in a properly addressed envelope with sufficient postage attached to carry the same to their destination.

This _____ day of July, 1965.

_____

George E. C. Hayes